

THE KLAMATH TRIBES

IBLA 96-231

Decided June 13, 1996

Expedited consideration of an appeal of a decision by the Oregon State Office, Bureau of Land Management, to issue an addendum to cultural resource use permit OR-40542.

Decision vacated; case remanded.

1. Administrative Practice—Administrative Procedure: Decisions—Notice

The recipient of a decision is entitled to a reasoned and factual explanation of the basis of the decision and a full and fair opportunity to raise issues and arguments on appeal.

APPEARANCES: Lea Ann Easton, Esq., Portland, Oregon, for the Klamath Tribes; Marianne Werner King, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management; Christopher H. Meyer, Esq., Boise, Idaho, for Atlas Perlite, Inc.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Klamath Tribes (the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians) have appealed a February 1, 1996, decision by the Oregon State Office, Bureau of Land Management (BLM), to issue an addendum to cultural resource use permit OR-40542. Permit OR-40542 authorizes Kautz Environmental Consultants (Kautz) to conduct archaeological collection, excavation, and mitigation at nine sites on Tucker Hill near Valley Falls, Oregon. Kautz is retained by Atlas Perlite, Inc. (Atlas), a subsidiary of the Atlas Corporation, to undertake archaeological work on Tucker Hill as part of the permitting process under which Atlas seeks approval of a plan of operations to mine perlite.

By order dated March 28, 1996, the Board granted the Tribes' petition to stay issuance of the addendum. Initial review of the record indicated "that the Tribes may prevail on the merits of their appeal due to deficiencies in procedure and documentation" (Mar. 28, 1996, Order at 1). In particular, it was noted that BLM's cover letter to Kautz accompanying the addendum stated that it "added five archaeological sites to those sites specified in the original permit," and its letter informing the Tribes of the decision stated that two sites had been added. *Id.* In addition, the order noted that Kautz's October 1995 testing plan, apparently prepared in

support of its permit application, proposed performing shovel probes and digging 1 by 1 meter test units at 9 sites, but its January 1996 plan, apparently submitted in support of the addendum, called for mechanical trenching and hand excavation work at 14 sites. Id. at 2.

On April 5, 1996, Atlas filed a "Motion for Clarification of Stay and for Expedited Consideration of Remaining Issues." On April 12, 1996, Atlas filed a motion for reconsideration of the stay. Atlas explains that Kautz had excluded two sites from its October 1995 testing plan because those sites appeared to be on bedrock and could not be probed, and that it applied for the addendum at BLM's recommendation so the sites could be documented (Apr. 12, 1996, Motion at 3). Atlas states that the other three sites not included in the October 1995 testing plan were excluded because they were already considered significant, but were included in the addendum at BLM's suggestion to allow examination as possible mitigation sites. Id. Atlas also states that it asked for mechanical trenching at BLM's urging. Id. at 4.

On May 2, 1996, BLM filed a motion for reconsideration of the stay. An affidavit by Richard C. Hanes, Regional Archaeologist for the Oregon/Washington State Office, confirms Atlas's explanation of events. He states that in mid-December management in the Lakeview District Office noticed a discrepancy between the sites listed in the permit and those identified in a draft environmental impact statement (DEIS) for the project and, after the Federal furlough ended in January, the Lakeview District Office contacted him suggesting the permit be amended to add two sites (BLM Motion, Exh. 2 at 2). Hanes states that in mid-December BLM consulted the Oregon State Historic Preservation Office and decided "to revise the testing strategy developed by Kautz" from testing to determine whether individual sites merited listing on the National Register of Historic Places (see 36 CFR 800.4) to determining the effect of the project on site values. See 36 CFR 800.5. He states that the letter would enable "development of appropriate mitigation measures necessary to preserve information offered by the sites." Id. As a result of this change, "testing strategies were altered and included mechanical trenching in addition to hand-dug pit units." Id. Hanes further states that by late January he had prepared the permit package to add two sites, when the Lakeview District Office again contacted him and requested the addition of three more sites. Id. at 3. As a result, the permit and transmittal letter to Kautz were revised, but the notification letter to the Tribes, which had been previously prepared for transmittal, was "overlooked." Id.

Hanes explains that, after issuing the addendum, BLM acquired additional knowledge of the Klamath Tribes' concerns regarding testing in the project area at a meeting between Lakeview BLM personnel and the Klamath tribal council on January 15. An early February meeting among BLM, Atlas, and Kautz "resulted in revised testing strategies and identification of the overall strategy for BLM's compliance with the National Historic Preservation Act." Id. "In response to tribal concerns," Hanes states, "the revised archaeological testing strategy reduced significantly the

amount of mechanical testing specified in the January document and redesigned the project to avoid one site (KEC-32-32)." Id. Kautz submitted a revised testing plan in March 1996. Id. at 4 and Exh. 1.

BLM argues that compliance with the National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (1994) is a fluid, evolving process involving discussions among a number of parties as a proposed plan is refined to best evaluate potentially significant archaeological and cultural sites (BLM Motion at 6-7; see Exh. 4 at 2). Because the process is consultative, BLM asserts, "much of the exchange of knowledge is verbal [sic], and therefore not reflected in the case file." Id. at 6. BLM contends that "the Board now has before it documentation of the process undertaken to determine that the issuance of the Addendum to the Cultural Resource Use Permit was reasonable and grounded in the agency's statutory obligations." Id. at 7.

Atlas's April 5, 1996, motion for clarification is denied. As Atlas acknowledged, that motion was filed prior to its having received the March 28, 1996, order. Atlas's request for expedited consideration of the merits of the appeal is granted.

[1] We do not question the chronology of events the parties have described. However, this explanation of events leading to the decision to issue the addendum does not rectify the procedural deficiencies identified in the stay order. The stay was not issued because the record lacked documentation of BLM's consultation with the Tribes. It was issued because we lack the documentation necessary to establish that the Tribes were adequately informed of BLM's decision. ^{1/} Recognizing that BLM has a multitude of methods to review a permit application, at some point it will decide to deny the application or issue a permit. See 43 CFR 7.5, 7.6, 7.8. If issued, the permit establishes, among other things, "[t]he nature and extent of work allowed and required under the permit, including the time, duration, scope, location, and purpose of the work." 43 CFR 7.9(a)(1). When subsequent events indicate a need to change the nature,

^{1/} A lack of documentation was of concern when reviewing the Tribes' appeal of the decision to issue Permit OR-40542. In examining whether BLM had consulted with the Tribes, as required by the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1994), the Board noted that the record did not contain direct documentation of meetings, although recent consultations were identified in the DEIS. The Klamath Tribes, 135 IBLA 192, 199 (1996). Examining the DEIS, the Board found that it "devotes considerable space to addressing Native American concerns," and concluded that "BLM was well aware of the Tribes' religious objections to disturbance on Tucker Hill and considered possible mitigation measures." Id. at 199, 202. Because the DEIS reflected a clear understanding of the Tribes' concerns, the Board concluded that BLM had adequately consulted with them as required by AIRFA. The AIRFA consultation requirement is quite different from the due process concerns which motivate the requirement that parties be provided adequate notice of a decision.

scope, or location of the work authorized by the permit, the permit may be modified. 43 CFR 7.9(f). Decisions to issue, deny, suspend, revoke, or modify a permit are all subject to appeal. 43 CFR 7.11; see also 43 CFR 7.36.

When a decision is issued, a recipient of the notice of that decision must be provided a reasoned and factual explanation of the basis of the decision and a full and fair opportunity to raise issues and arguments on appeal. See Larry Brown & Associates, 133 IBLA 202, 205 (1995); Burnett Oil Co., 122 IBLA 330, 332 (1992); Annaco, Inc. v. Office of Surface Mining Reclamation and Enforcement, 119 IBLA 158, 166 (1991), quoting Annaco, Inc. v. Hodel, 675 F. Supp. 1052, 1058 (E.D. Ky. 1987); Exxon Company, U.S.A., 113 IBLA 199, 205 (1990); Kanawha & Hocking Coal & Coke Co., 112 IBLA 365, 368 (1990).

Documents in the record reflect the nature and extent of the notice given to the Tribes regarding BLM's decision to issue the addendum. These documents are the February 1, 1996, letter to the Tribes and the Tribes' notice of appeal. Both state that two additional sites were approved by the addendum. Atlas asserts that BLM enclosed a copy of the addendum with its letter (Apr. 12, 1996, Motion at 5). However, the letter to the Tribes refers only to a Form 1842-1 as having been enclosed. Nor does the record show the Tribes were informed that the February 1, 1996, decision approved mechanical trenching at the five additional sites and at the nine previously approved sites. From the record, it appears unlikely that any portion of Kautz's January 1996 plan was enclosed with the February 1, 1996, decision. The Lakeview District Office's request to add three additional sites was not "verbally [sic] received" by the Oregon/Washington State Archaeologist until January 29, 1996 (Mar. 5, 1996, cover memorandum submitting record to IBLA). There is no record of what the Lakeview District Office discussed with the Tribes on January 15, and the record does not show they were provided a copy of the January 1996 plan. Atlas states that "[c]opies of all reports and documents prepared by Kautz or Atlas have been forwarded to the Tribes" (Apr. 12, 1996, Motion at 5), but offers no proof the Tribes received the January 1996 plan prior to issuance of BLM's decision.

The record before the Board shows only that the Tribes were notified BLM was issuing a decision to add two sites to Permit OR-40542 and does not show that they were notified as to the additional three sites, the nature and extent of the work authorized, or other matters defined by issuance of the addendum. Absent adequate notice providing a full and fair opportunity to appeal a decision, the decision must be vacated. The Board cannot presume that the Tribes would not have raised different issues and arguments given full notice of the decision. Atlas' and BLM's motions for reconsideration of the stay are denied as moot.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, expedited

consideration of the February 1, 1996, decision by the Oregon State Office to issue an addendum to cultural resource use permit OR-40542 is granted, the decision is vacated, and the case is remanded.

R. W. Mullen
Administrative Judge

I concur.

John H. Kelly
Administrative Judge

